

MAKING & OVERCOMING OBJECTIONS:

**HEARSAY & OTHER EVIDENCE-
BLOCKING OBJECTIONS**

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MAKING OBJECTIONS

- “Objection!”:
 - Strategically
 - Loudly
 - Confidently
 - Quickly
- State the Grounds
- Let Opposing Counsel Respond
- Be Prepared to Argue Your Point



OVERCOMING OBJECTIONS

- Follow rules of direct and cross examination to minimize objections
- **Know the Rules** and cases interpreting the Rules
 - Anticipate and incorporate into your trial prep materials
- Keep it short and sweet unless a longer argument or explanation is warranted and advances your theory



PROFFERING EVIDENCE

Rule 103. Rulings on Evidence

- (a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
1. if the ruling admits evidence, a party, on the record:
 - A. timely objects or moves to strike; and
 - B. states the specific ground, unless it was apparent from the context; or
 2. if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

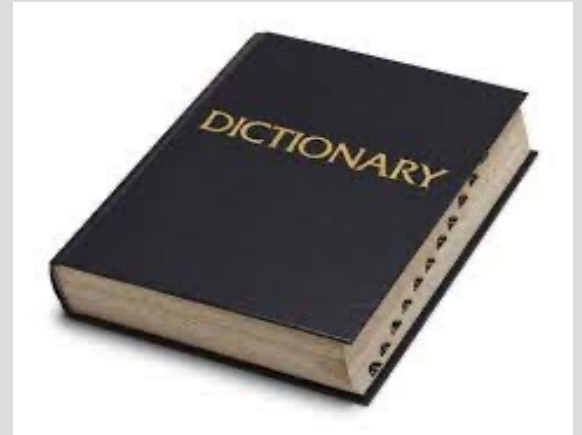
HEARSAY OBJECTIONS

HEARSAY – MRE RULE 801



- A statement that:
 1. the declarant does not make while testifying at the current trial or hearing; and
 2. a party offers in evidence to prove the truth of the matter asserted in the statement.

NOT HEARSAY – OUTSIDE THE DEFINITION



- Statements introduced to impeach a witness
- Statements made to rehabilitate/un-impeach after impeachment
- Identifies a person as someone the declarant perceived earlier
- Statements offered against an opposing party
- Statements made by the party's co-conspirator during and in furtherance of the conspiracy

COMMON EXCEPTIONS TO HEARSAY

- Present Sense Impression
- Excited Utterance
- Then-Existing Mental, Emotional, or Physical Condition
- For Medical Diagnosis or Treatment
- Statement Against Interest

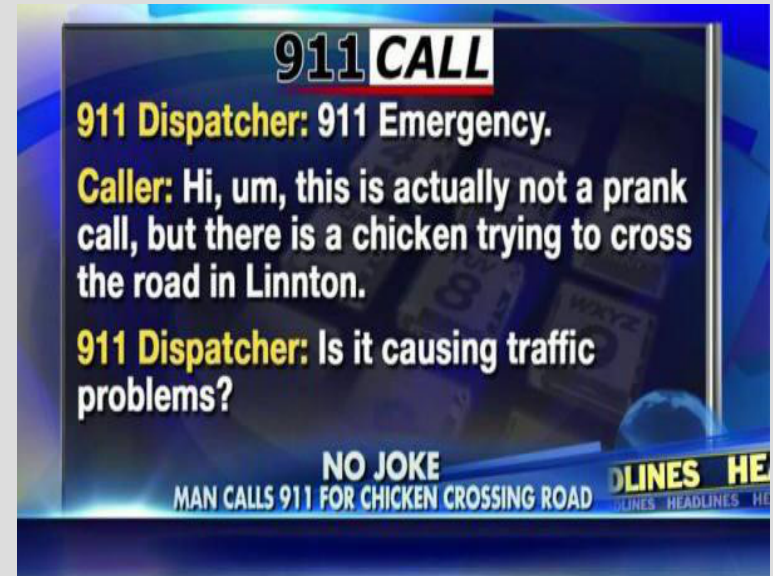


**HEARSAY EXCEPTIONS
APPLICABLE
REGARDLESS OF
WITNESS AVAILABILITY**

Rule 803

(I) PRESENT SENSE IMPRESSION

- A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- Precise contemporaneity may not be possible so slight lapse may be permissible. Spontaneity is the essential factor.
- **Examples**
 - “He’s trying to get in my door. He’s yelling that he wants to kill me.”
 - “OMG, that kid just walked up and punched that other kid.”
 - Narrating in real time, not afterwards to officer taking report.



(2) EXCITED UTTERANCE



- A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- Based on reasoning that excited condition impedes the capacity for reflection such that resulting statements are free of conscious fabrication. Spontaneity is also key.
- Examples
 - “Run! He’s got a gun!!!!”

(3) THEN-EXISTING MENTAL EMOTIONAL, OR PHYSICAL CONDITION



- A statement of declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)
- Not a statement of memory or belief to prove the fact remembered or believed
- **Examples**
 - "I was so mad, I was fit to be tied."
 - "I just wanted to get my money back, I didn't mean to hurt him."

(4) STATEMENT MADE FOR MEDICAL DIAGNOSIS OR TREATMENT

A statement that:

- A. Is made to any person at any time for - and is reasonably pertinent to - medical diagnosis or treatment
 - B. Describes medical history, past or present symptoms or sensations, their inception, or their general cause; **AND**
 - C. Is supported by circumstances that substantially indicate its trustworthiness.
- Includes emotional, mental, and physical health.
 - Does not include statements concerning fault or other mixed-in statements not related to diagnosis or treatment.



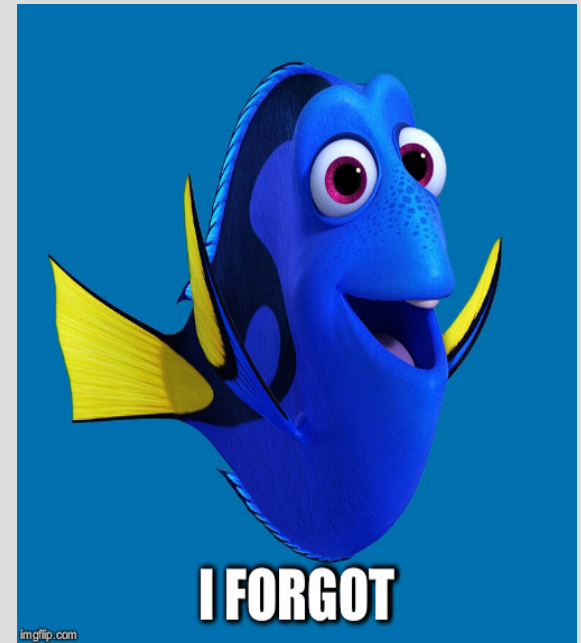
(5) RECORDED RECOLLECTION

A record that:

- A. Is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
 - B. Was made or adopted by the witness when the matter was fresh in the witness's memory; and
 - C. Accurately reflects the witness's knowledge.
- If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.
 - See also MRE 612

Example

- Using a police report to refresh the recollection of a witness regarding a license plate number they no longer remember



(22) JUDGMENT OF PREVIOUS CONVICTION



Evidence of a final judgment of conviction if:

- (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
- (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
- (C) the evidence is admitted to prove any fact essential to the judgment; and
- (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(25) TENDER YEARS EXCEPTION



A statement by a child of tender years describing any act of sexual conduct with or by another if:

A. the court determines that the statement's time, content, and circumstances provide a substantial indicia of reliability; and

B. the child either:

- a. testifies; or
- b. is unavailable and other evidence corroborates the act.

- Tender years can be 14 or older if mental age is lower
- 12 factors in AC Notes for determining “indicia of reliability”
 - Motive to lie, timing, age/maturity, use of suggestive techniques, etc.
 - Cannot use corroborating evidence
- In a criminal case, the rights of the defendant under the Confrontations Clauses of Federal and State Constitutions must be respected. [Crawford v. Washington, 124 S. Ct. 1354 \(2004\)](#)

(24) OTHER EXCEPTIONS

A statement not specifically covered by this Rule if:

- A. the statement has equivalent circumstantial guarantees of trustworthiness;
- B. it is offered as evidence of a material fact;
- C. it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;
- D. admitting it will best serve the purposes of these rules and the interests of justice; &
- E. before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Example:

- A newspaper article from more than 50 years ago admitted to show damage to a clock tower could have been from a previous fire. *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961)

HEARSAY EXCEPTIONS
APPLICABLE IF WITNESS IS
UNAVAILABLE

Rule 804

DEFINITION OF UNAVAILABLE

SORRY!
I'm CURRENTLY
UNAVAILABLE



1. Exempted from testifying because privilege applies;
2. Refuses to testify about subject despite court order;
3. Testifies to not remembering the subject matter;
4. Cannot testify due to death, infirmity, physical illness, or mental illness;
5. Absent and unable to procure by process or other reasonable means:
 - A. In the case of former testimony exception or exception that party wrongfully caused unavailability
 - B. In the case of a hearsay exception under Statement Under Belief of Imminent Death, Statement Against Interest, or Statement of Personal or Family History; or
6. A child for whom testifying in the physical presence of the accused is substantially likely to impair the child's emotional or psychological health substantially.



(6) FORFEITURE BY WRONGDOING

A statement offered against a party that wrongfully caused – or acquiesced in wrongfully causing – the declarant’s unavailability as a witness, and did so intending that result.

- Party forfeits rights under Confrontation Clause
- Applies to all parties, including the government

(I) FORMER TESTIMONY



Testimony that:

- A. Was given as a witness at a trial, hearing or lawful deposition, whether given during the current proceeding or a different one; and
- B. Is now offered against a party who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Example:

- Suppression Testimony

(2) STATEMENT UNDER THE BELIEF OF IMMINENT DEATH



In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

AKA: Dying Declaration

(3) STATEMENT AGAINST INTEREST



A statement that:

- A. a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
- B. is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

OTHER EXCEPTIONS

A statement not specifically covered by this Rule if:

- A. the statement has equivalent circumstantial guarantees of trustworthiness;
- B. it is offered as evidence of a material fact;
- C. it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;
- D. admitting it will best serve the purposes of these rules and the interests of justice; and
- E. before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Identical to MRE 803(24)

HEARSAY WITHIN HEARSAY

Rule 805. Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Example:

- The radio dispatcher relayed information to me from the 911 caller relative to a silver Prius speeding erratically down Main Street



NON-HEARSAY OBJECTIONS

OTHER COMMON OBJECTIONS

- Relevance
- More Prejudicial Than Probative
- Prior Bad Acts/Character Evidence
- Lack of Personal Knowledge

Form of the Question

- Vague
- Asked and Answered
- Compound Question
- Assumes Facts Not In Evidence

- Calls for Speculation/Opinion
- Argumentative/Testifying

Common Objections to Direct

- Leading
- Calls for a Narrative
- Lack of Foundation
- Beyond the Scope (Redirect/Expert)

RELEVANCE VS. MORE PREJUDICIAL THAN PROBATIVE

Rule 401. Test for Relevant Evidence Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the case.



Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

EXPLAINING THE INVESTIGATION

Every DA ever: What did victim tell you, officer?

Me: Objection, hearsay!

Every DA ever: It's not for the truth of the matter, the officer is just explaining the steps they took in the investigation

If not for the truth of the matter, then it is likely:

- Irrelevant
- More prejudicial than probative

If overruled, don't let them get away with referring to it as substantive evidence in closing.

GENERAL CHARACTER EVIDENCE

Rule 404

- Evidence of a person's character/character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character/trait.

Exceptions

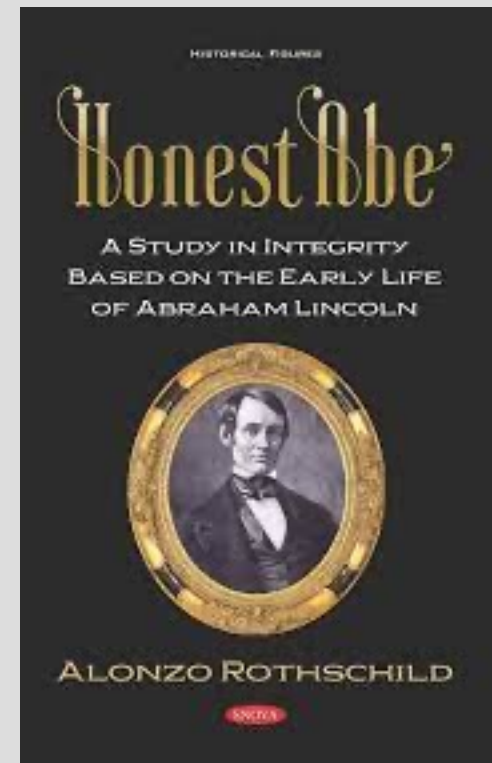
- (A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
- (B) a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; and
- (C) the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.



WITNESS'S CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS

Rule 608

- (a) **Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
- (b) **Specific Instances of Conduct.** Except for a criminal conviction, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
- (1) the witness; or
 - (2) another witness whose character the witness being cross-examined has testified about.



CRIMES, WRONGS, OR OTHER ACTS



Rule 404(b)

- 1) **Prohibited Uses.** Not admissible to show that on a particular occasion the person acted in accordance with their character.
- 2) **Permitted Uses.** May be admissible for proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Rule 609. Impeachment by Evidence of a Criminal Conviction

Evidence of a juvenile adjudication is admissible under this rule only if:

- (1) it is offered in a criminal case;
- (2) the adjudication was of a witness other than the defendant;
- (3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and
- (4) admitting the evidence is necessary to fairly determine guilt or innocence.

SPECULATION/ LACK OF PERSONAL KNOWLEDGE

Rule 602. Need for Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony.

- This rule does not apply to a witness's expert testimony.



IMPROPER OPINION TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.



SEXUAL BEHAVIOR OR PREDISPOSITION

Rule 412

Not admissible: reputation or opinion of past sexual behavior or past sexual behavior except:

- I) specific instances of a victim's past sexual behavior:
 - A. with a person other than the defendant, if offered by the defendant to prove that someone else was the source of semen, pregnancy, disease, or injury;
 - B. with the defendant, if offered by the defendant to prove consent; and
 - C. if constitutionally required to be admitted; and
- 2) false allegations of sexual offenses made at any time before trial by the victim.

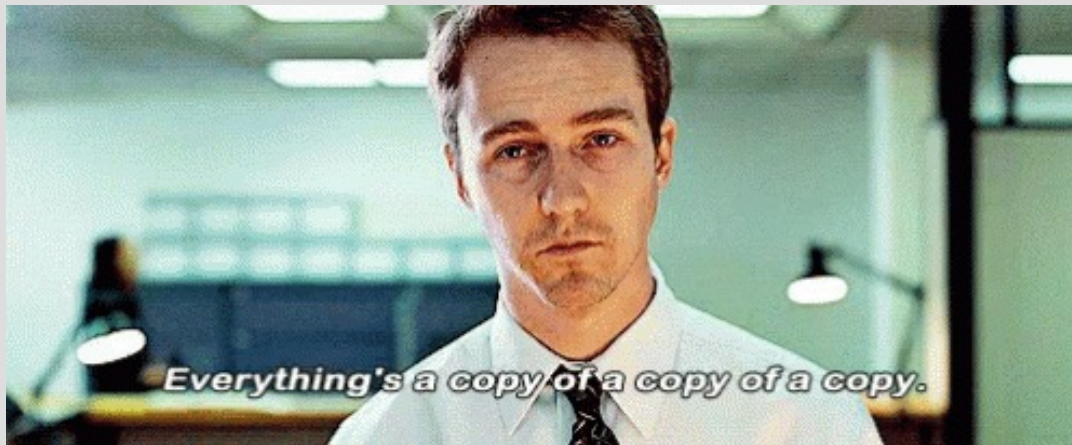
REQUIREMENT OF THE ORIGINAL

Rule 1002. Requirement of the Original (Best Evidence Rule)

An original writing, recording, or photograph is required in order to prove its content unless otherwise provided by law.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.



FORM OF THE QUESTION



Rule 611

The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

- Leading
- Argumentative
- Assumes Fact Not in Evidence/Lack of Foundation
- Misstates the Evidence
- Calls for a Narrative
- Confusing/Vague/Ambiguous
- Compound Question

RULE 611(C): LEADING QUESTIONS

Leading questions should not be used on direct examination except as necessary to develop the witness's testimony.

Ordinarily, the court should allow leading questions:

- (1) on cross-examination; and
- (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Which is leading?

- 1. Can you please describe the car?
- 2. What color was the car?
- 3. Was the car red?
- 4. The care was red?

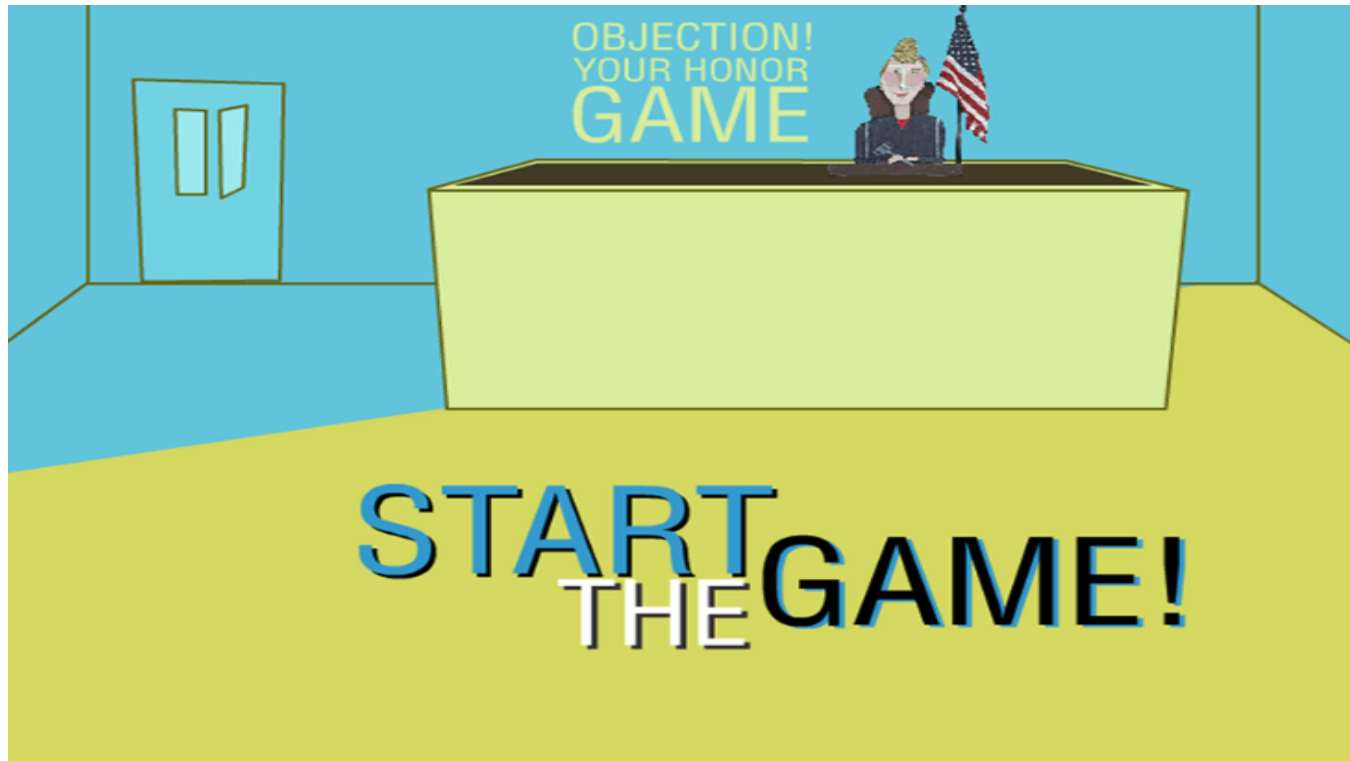


LACK OF FOUNDATION

- Evidence cannot arise from a factual vacuum
- Missing foundation can relate to:
 - Relevance
 - Personal Knowledge
 - Authentication
- Other missing facts or logical steps that would show the witness is qualified to answer a question



EXERCISES



https://texaslre.org/games_eng/Objection